Employment Law Briefing

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Asking the wrong questions

Employer faces lawsuit for inquiring about plaintiff's retirement

When looking to fill an open position, employers must ask many questions. But asking the wrong ones can land an organization in court. Such was the case in *Shelley v. Geren*. Here the U.S. Court of Appeals for the Ninth Circuit considered whether a district court erred when it granted summary judgment to an employer named in a lawsuit filed under the Age Discrimination in Employment Act (ADEA).

Hiring process

In 2005, the U.S. Army Corps of Engineers tried to fill an open Chief of Contracting position using a two-step hiring process:

1. Advertise an opening for a 120-day temporary position.

2. Follow a formal process to hire a permanent Chief of Contracting.

When the plaintiff applied in response to the temporary position advertisement, he was 54 years old and serving as Assistant Chief of the Contracting Division. He'd been working with the Corps for approximately 26 years, but didn't even receive an interview. The job was awarded to a 42-year-old Corps employee.

The second step of the hiring process called for a five-member panel to review the applications. Two panel members allegedly requested information about projected retirement dates to be incorporated into a spreadsheet known as the Capable Workforce Matrix.

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Although the matrix didn't include any names, it did display information such as job titles, grade levels and anticipated retirement dates that would make it easy to deduce who was whom. The permanent job was ultimately awarded to the 42-year-old employee who'd been hired for the temporary position.

On learning of this decision, the plaintiff contacted the Corps' Equal Employment Opportunity officer. After exhausting his administrative remedies, he then filed suit in federal district court alleging that he'd been discriminated against because of his age. The district court granted the Corps' motion for summary judgment, and the plaintiff appealed.

The matrix revisited

Since the U.S. Supreme Court's recent decision in *Gross v. FBL Financial Services*, it's well settled that, unlike Title VII, the ADEA doesn't provide that a plaintiff may establish discrimination by showing that age was simply a motivating factor behind an adverse employment action. ADEA plaintiffs may prevail at trial only by showing that age was the "but for" cause of the action.

Of particular importance in this case was the role of the Capable Workforce Matrix. Because the Corps provided a legitimate, nondiscriminatory reason as to why it hired the 42-year-old for the position, the plaintiff's burden was to prove that the matrix showed a pretext for age discrimination.

The Ninth Circuit explained that plaintiffs can prove pretext either directly or indirectly, and it found the request

for retirement information to be direct evidence of pretext. The court rejected the Corps' argument that the matrix, at best, proved that the hiring panel knew of the plaintiff's prospective retirement date. Rather, the court noted that the timing of the request showed that the Corps considered the information in the matrix relevant to its hiring decision.

Accordingly, the court held that the plaintiff put forth sufficient evidence to support an inference that his age was the reason why he wasn't awarded either position. It reversed the lower court's order for summary judgment.

Level of animus

Although the Ninth Circuit held that the matrix was direct evidence of "but for" age discrimination in *Shelley*, there was a dissenting opinion. Noting that "direct evidence is evidence which, if believed, proves the fact [of discriminatory animus] without inference or presumption," the dissenting judge disagreed that the request for information in creating the matrix showed this level of animus.

Ultimately, this case should remind employers that, when it comes to hiring, timing is everything. There are significant risks associated with asking certain questions or requesting certain information before any hires or promotions. ♦

Stray remark leads to a contrasting decision

In *Shelley v. Geren*, the Ninth Circuit looked at whether the employer's actions were direct evidence of pretext for age discrimination. (See main article.) Another recent case, *Moss v. BMC Software, Inc.*, posed a similar question. And the U.S. Court of Appeals for the Fifth Circuit came to a markedly different conclusion.

The 68-year-old plaintiff applied for an open position at BMC Software in Sept. 2006. The position, Staff Legal Counsel, would report directly to the Associate General Counsel, who was responsible for making the final hiring decision. Despite the plaintiff's extensive legal career, the Associate General Counsel initially didn't even offer him an interview because she felt he lacked the relevant experience.

The plaintiff then sent his qualifications directly to BMC's General Counsel, who forwarded the letter to the Associate General Counsel. She then conducted a phone interview with the plaintiff as well as an in-person interview, which was also attended by the General Counsel and two other members of BMC's legal department. The plaintiff claimed that, during the interview process, the Associate General Counsel stated that BMC was searching for a lawyer at a "more junior level" to her own position. Afterward, the interviewers unanimously agreed that the plaintiff lacked the hands-on experience needed for the position and selected a considerably younger applicant.

After the district court granted BMC's motion for summary judgment, the plaintiff appealed to the Fifth Circuit. The plaintiff argued that the Associate General Counsel's "more junior level" statement was direct evidence of an age-based animus and should have precluded the grant of summary judgment.

The court disagreed. It interpreted the comment to mean that the Associate General Counsel needed an attorney at a lower level in the organization than her — not necessarily someone younger than her. Because age-based comments must be direct and unambiguous to clearly indicate an employer's discriminatory intent, the Fifth Circuit labeled this comment a "stray remark" and affirmed the district court's order.

The amendment effect

ADA changes put to the test in recent case

The Americans with Disabilities Act (ADA) was passed in 1990. But the story doesn't end there. In 2008, the ADA Amendments Act (ADAAA) was passed and, in 2011, the Equal Employment Opportunity Commission (EEOC) released revised regulations for interpreting those amendments. All of these changes were put to the test in the case of *Allen v. SouthCrest Hospital*, heard by the U.S. Court of Appeals for the Tenth Circuit.

Uncertain resignation

In 2006, SouthCrest Hospital acquired the medical group for which the plaintiff worked as a medical assistant and offered her a position working with the same group of doctors with which she'd previously worked. In March 2009, the plaintiff transferred from one doctor's office to another's. Although her duties remained essentially the same, the second doctor saw all of his patients on three half-days per week. So the plaintiff was under greater pressure.

During this time, she began experiencing constant migraine headaches. The migraines varied in severity, with the most severe being so debilitating that the plaintiff didn't go to work. She made an appointment with a SouthCrest doctor, who prescribed medication for the migraines.

However, on Aug. 26, she suffered a migraine while at work that landed her in the emergency room. Because of her ongoing migraines and hypertension, the plaintiff had actually tendered her resignation before this emergency room visit. Although the effective date of her resignation was Aug. 17, she remained at work until Aug. 27 because she was covering for several employees she knew would be on vacation.

On Aug. 27, the day after her ER visit, the plaintiff expressed a desire to rescind her resignation. But SouthCrest called the plaintiff and accepted her resignation — effective immediately.

After leaving her job, the plaintiff sued SouthCrest in federal district court, alleging violations of the ADA for failure to accommodate and wrongful termination. Her former employer made a motion for summary judgment, which was granted by the district court. The plaintiff appealed.

Major life activity

Under the ADA, a person is disabled if he or she suffers from a physical or mental impairment (the first prong) that substantially limits (the second prong) one or more major life activities (the third prong). On appeal, it wasn't disputed that the plaintiff met the first prong, as migraine headaches clearly qualify as a physical impairment. But still in dispute was whether she'd established the remaining two prongs of the test.

The plaintiff's primary argument was that she was substantially limited in the major life activity of "working." Before 2011, the EEOC explained in its Interpretive Guidance that, for an employee to be disabled in the major life activity of working, the employee must be restricted in the ability to perform "either a class of jobs or a broad range of jobs in various classes."

The plaintiff conceded that working for a single physician doesn't qualify as "a class" or "broad range" but argued that it should qualify under the ADAAA because the congressional intent behind the act was to "reinstate a broad scope of protection to be available under the ADA."

Moreover, the plaintiff noted that, because the language defining "working" as a "class of jobs or broad range of jobs" was removed when the EEOC amended the Interpretive Guidance in 2011, this omission further proved intent to broaden the ADA's scope.

Still in effect

The Tenth Circuit rejected the plaintiff's argument. Citing the amended Interpretive Guidance as well, the court noted that the EEOC actually provided an explanation for the omission — and it had nothing to do with an intent to alter the definition of "working."

The EEOC removed the language because no other major life activity receives "special attention" in the regulations. The narrowing language was, therefore, eliminated to bring consistency to the major life activities. Doing so wasn't evidence of a shift in congressional intent.

Indeed, the court pointed out that the EEOC affirmatively stated in the Interpretive Guidance that, while the narrowing language may have been eliminated, it remains in effect. Thus, because the plaintiff worked for only one physician and didn't perform a class of jobs or a broad range of jobs, she wasn't disabled under the ADA. The court affirmed the lower court's grant of summary judgment.

Hurdles to clear

The purpose of the ADAAA is to make it easier for individuals to bring ADA actions. But, as this case demonstrates, plaintiffs still have a number of hurdles to clear.

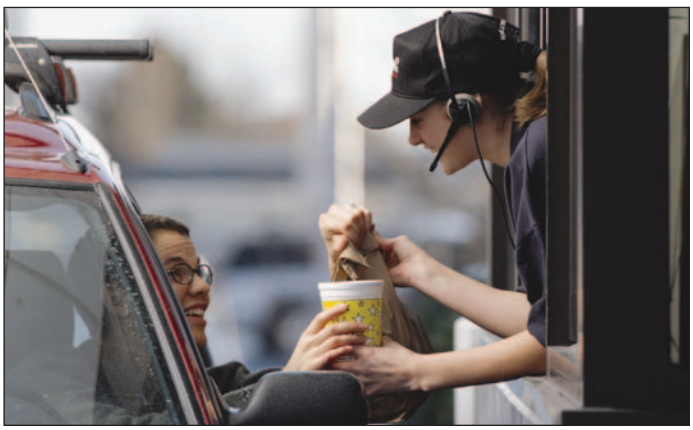
If you have questions or concerns about whether the ADAAA or revised EEOC regs put your company at legal risk, contact your employment law attorney. ♦

Step carefully when terminating employees on FMLA leave

An employer may have a legitimate reason to fire an employee. But if that worker has taken leave under the Family and Medical Leave Act (FMLA), the organization must step carefully or risk a lawsuit. A case in point is *Donald v. Sybra, Incorporated*, heard by the U.S. Court of Appeals for the Sixth Circuit.

Drive-thru dealings

The plaintiff worked for Sybra LLC as an assistant manager at its Arby's restaurants for over two years. She was hired in 2005 and, shortly thereafter, began experiencing a number of serious health problems that required her to take leave. In 2006, she missed a week of work for gallbladder surgery and, in 2007, she missed about eight weeks to receive treatment for ovarian cysts and renal stones.



On Sept. 15, 2007, the plaintiff was transferred to a different Arby's where she worked under that restaurant's manager. On Feb. 14, 2008, while examining receipts from the plaintiff's drive-in window drawer, the manager noticed irregularities in how customers were charged. The receipts showed orders were taken at full price and customers were given a full price total, but then the orders were changed to a discounted price.

The manager secretly listened in on the plaintiff's orders over the next few days. After comparing the orders to the figures entered into the plaintiff's register, the manager suspected that she was stealing from the company. He notified his supervisors.

Ongoing pain

During the manager's investigation, the plaintiff used two of her paid time off days to receive treatment for ongoing pain associated with renal stones. She notified the manager on Feb. 26 that she would be unable to return to work until Feb. 29. When the plaintiff returned, she was told about the manager's investigation and terminated that day.

The plaintiff then filed a complaint in federal court alleging that Sybra had fired her in violation of the FMLA. Specifically, she claimed that Sybra had interfered with her use of FMLA leave and then retaliated against her for taking FMLA leave. The district court granted summary judgment in favor of Sybra, and the plaintiff appealed.

Honest belief

Under the FMLA, it's unlawful for employers to either "interfere with, restrain, or deny the exercise of or the attempt to exercise" any provision in the act, or to "discharge or in any other manner discriminate against any individual for opposing any practice made unlawful" by the act.

To defeat Sybra's motion for summary judgment, the plaintiff needed to establish a prima facie case of either FMLA interference or retaliation. If successful, the burden would then shift to Sybra, requiring it to show some legitimate, nondiscriminatory reason for the termination. The ultimate issue before the court would then be whether that reason was pretext for discrimination.

On appeal, the plaintiff maintained innocence and argued that, because she was innocent, Sybra's proffered reason had to be pretextual. The Sixth Circuit, however, applied the "honest belief rule," under which a court won't "wade into an employer's decision making process" as long as the employer's decision was informed, nondiscriminatory and reasonable in light of the facts known at the time of the decision.

As such, the court held that, even if the plaintiff could establish a prima facie case, she still couldn't prove pretext. After all, the manager had conducted a valid investigation and the results cast legitimate suspicion on the plaintiff. Therefore, the Sixth Circuit affirmed the district court's grant of summary judgment.

Lessons to heed

The honest belief rule is indeed a powerful tool for employers. But organizations should heed the lessons of this case. That is, Sybra didn't do itself any favors by waiting nearly two weeks before terminating an employee who was allegedly stealing and then discharging that employee on her first day back from FMLA leave. ♦

Subjective criteria can pose risks in promotion decisions

Some promotion decisions are easy; others aren't. If subjective criteria come into play, legal risks may arise. In *Hamilton v. Geithner*, the U.S. Court of Appeals for the District of Columbia considered whether the subjective criteria used to bypass an employee for promotion were really a smokescreen for racial discrimination.

Grading the candidates

In October 2001, the plaintiff, an African-American man, accepted employment within the IRS's Real Estate and Facilities Management department. His grade position under the federal government's General Schedule was GS-12. Before accepting this position, the plaintiff spent about 15 years as an Industrial Hygienist for the Navy and Department of Defense, a GS-13 position. He also held a bachelor's degree in industrial hygiene and a master's degree in public health.

More than a year later, a GS-14 "Safety Specialist" position opened up and the plaintiff applied. All applicants were initially ranked based on various criteria, with the highest possible score being a 25. After this initial ranking, the four highest scoring candidates advanced to the second round: two Caucasian females, one Caucasian male and

the plaintiff. The two women and the plaintiff all received perfect scores.

The second round consisted of an interview conducted by a three-member panel. Here evaluation was purely subjective. At the conclusion of the round, one of the Caucasian females was selected for the position.

Filing a complaint

After learning he'd been bypassed for the promotion, the plaintiff discovered that, one year earlier, the female employee who had been promoted had received a temporary position in a GS-14 managerial role. Shortly thereafter, he contacted the IRS's Equal Employment Opportunity (EEO) office for a counseling session.

During this session, the plaintiff claimed that IRS officials had acted with a discriminatory motive by promoting a "demonstrably" less-qualified white female and using a subjective evaluation process to create a legitimate explanation for its discriminatory practice. The plaintiff then filed a formal EEO complaint and later brought suit against the Treasury Secretary in federal court. The district court granted summary judgment to the Treasury Secretary, and the plaintiff appealed.

Presenting the evidence

The IRS presented a legitimate, nondiscriminatory reason for its decision to promote the female employee over the plaintiff — namely that the plaintiff didn't perform as well in the interview. Thus, the "central inquiry" on appeal was whether this reason was pretext for discrimination.

Although there are several ways a plaintiff can demonstrate pretext, the primary focus in this case was a comparison between the plaintiff's and the promoted employee's qualifications. According to the court,

> If a fact finder can conclude that a reasonable employer would have found the plaintiff to be significantly better qualified for the job … the fact finder can legitimately infer that the employer consciously selected a less-qualified candidate, something that employers do not usually do, unless some other strong consideration, such as discrimination, enters into the picture.

Reviewing the facts, the court concluded that the plaintiff presented enough factual evidence for a jury to find that he was "significantly better qualified" than the employee who was promoted. When he applied for the position in 2003, he had about 19 years of experience working in industrial hygienist and safety professional positions — including 15 years in a GS-13 position and nearly two years as a GS-12 Industrial Hygienist with the IRS.

The promoted employee, on the other hand, had no college degree and little training in occupational safety, with most of her knowledge of safety practice and policy coming from on-the-job training. Compared to the plaintiff's 19 years of consecutive service in industrial hygiene, she had about eight years of experience when she applied in 2003, most of which were before 1997.

Disregarding the fact that both candidates had received perfect scores of 25, the court noted that this preliminary assessment made no comparison of one candidate's qualifications to another's and was merely designed to identify candidates worthy of future consideration. Accordingly, the court reversed the district court's order.

Supporting a promotion

The court's decision in this case highlights the potential pitfalls of using subjective criteria to support a promotion. And those risks become greater when the promoted employee may not be the most qualified based on objective criteria. ♦